No. 95-1679

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION,

Petitioner,

v.

CHAULK SERVICES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE STATES OF ARIZONA, CONNECTICUT, HAWAII, MAINE, MONTANA, NEW JERSEY, OKLAHOMA AND PENNSYLVANIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The States of Arizona, Connecticut, Hawaii, Maine, Montana, New Jersey, Oklahoma and Pennsylvania, through their respective Attorneys General, urge this Court to grant the petition for a writ of *certiorari* because the decision of the Court of Appeals for the First Circuit is emblematic of a line of cases which unwarrantedly have created a "preemption exception" to the operation of the abstention doctrine in the context of challenges to state administrative proceedings. There is no principled basis on which to disregard the *Younger v. Harris*, 401 *U.S.* 37 (1971) doctrine in an ongoing state proceeding which is judicial in nature, involving important state interests, and in which there is full opportunity to raise the federal question, merely because such federal question is one of preemption. In a wide variety of state quasi-judicial proceedings – including but not limited to those involving enforcement of state civil rights laws, the setting here – state administrative agencies are faced with federal preemption claims. To permit federal court interference with a state administrative proceeding simply because a colorable claim of preemption is raised would constitute a striking denigration of the states' ability to enforce federal law faithfully, cutting squarely against the federalism and comity underpinnings of *Younger* and its progeny (most notably the case recognizing *Younger*'s applicability to quasi-judicial hearings, *Ohio Civil Rights Comm. v. Dayton Christian Schools*, 477 *U.S.* 619 (1986)). In essence, the decision below (as well as certain other Circuit Court of Appeals decisions upon which the court below relies) would render *Younger* a nullity in the myriad of state administrative proceedings in which arguable federal

preemption claims can be asserted. This would seriously undermine the states' ability to enforce laws (such as the anti-discrimination statute involved here) arising out of deeply rooted state interests.

Amici also urge that this Court grant *certiorari* on the second question presented by petitioner: whether the National Labor Relations Act, 29 *U.S.C.* § 151 *et seq.* ("NLRA"), preempts a state law prohibiting gender discrimination in employment merely because the facts underlying the discrimination action overlap with NLRA-regulated activity. The large majority of cases brought under state civil rights statutes involve claims of employment discrimination. As this case demonstrates, factual allegations supporting a state law discrimination claim readily can touch on conduct regulated by the NLRA. The court below erred in finding preemption merely because the facts underlying the state discrimination claim in part coincided with facts supporting an NLRA unfair labor practice charge. *Amici* respectfully submit that the decision below will be very deleterious to the states' enforcement of their anti-discrimination statutes. While a state certainly is preempted from regulating NLRA-covered union activity, the mere fact that a discrimination claim arises in the setting of a union organizational effort does not warrant preemption of a state's civil rights law.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW INAPPROPRIATELY CREATES AN EXCEPTION TO THE *YOUNGER* ABSTENTION DOCTRINE SIMPLY BECAUSE OF THE EXISTENCE OF AN ARGUABLE FEDERAL PREEMPTION CLAIM.

Prior to this Court's decision in *New Orleans Public Service, Inc. v. Counsel of City of New Orleans*, 491 *U.S.* 350 (1989) ("NOPSI"), various Circuit Courts of Appeal had held that the *Younger* abstention analysis should not apply in cases involving claims of federal preemption because "comity . . . is not strained when a federal court cuts off state proceedings that entrench upon the federal domain." *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm.*, 772 *F.*2d 404, 417 (8th Cir. 1985), *cert. den. sub nom., Ratepayers Fight Back v. Middle South Energy, Inc.*, 474 *U.S.* 1102 (1986). *See also, Kentucky West Va. Gas Co. v. Penn. Public Ut. Comm.*, 791 *F.*2d 1111, 1116-17 (3d Cir. 1986); *Champion Int'l. Corp. v. Brown*, 731 *F.*2d 1406, 1408-09 (9th Cir. 1984). In contrast, other courts had rejected arguments that *Younger* abstention principles are inapplicable where federal preemption is asserted. *See, e.g., Potomac Electric Power Co. v. Sachs*, 802 *F.*2d 1527, 1531 (4th Cir. 1986), *vacated on other grounds*, 484 *U.S.* 1022 (1988) (it would be "anomalous to hold that a state court may decide federal constitutional issues but is unqualified or inhibited from deciding preemption issues"); *Brotherhood of Loc. Eng. v. Commission Against Discrimination*, 695 *F. Supp.* 1321, 1324-25 (D. Mass. 1988); *Fore Way Express, Inc. v. Wisconsin Dept. of Ind.*, 660 *F. Supp.* 310, 313 (E.D. Wisc. 1987).

This Court in *NOPSI* seemingly put this split to rest. In *NOPSI*, petitioner had asserted that the second prong of the test for *Younger* abstention articulated in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n.*, 457 *U.S.* 423, 432 (1982) – the existence of "an important state interest" – is not met where there is a "substantial claim" of federal preemption because such claim "calls into question the prerequisite of *Younger* abstention that the State have a legitimate, substantial interest in its pending proceedings." *NOPSI, supra*, 491 *U.S.* at 364. In speaking for this Court, Justice Scalia responded:

> We disagree. There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees. . . . [*Id.* at 365]

Therefore, even a "substantial" preemption claim does not negate the operation of the abstention doctrine. *Id.* at 367.

Petitioner in *NOPSI* also argued that "a facially conclusive" preemption claim should render abstention inappropriate. Justice Scalia responded: "Perhaps so. But we do not have to decide the matter here," as the preemption question necessitated "further factual inquiry – and what requires further factual inquiry can hardly be deemed 'flagrantly' unlawful for purposes of a threshold abstention determination." *Id.*

Despite this holding, the court below inappropriately seized on the above-quoted unanswered hypothetical to continue to recognize what essentially is a "preemption exception" to the *Younger* doctrine. The danger of such

unwarranted stretching of the "facially conclusive" language in *NOPSI* is seen in how the court below collapsed the *Younger* abstention issue into a determination of the preemption claim's merits. Even though this Court in *NOPSI* squarely *rejected* the view that a federal court "should take a quick look at the merits" of the preemption claim and if it "appears substantial . . . endeavor to resolve it," *id.* at 364-365, this is precisely what the court below did, extensively discussing the merits of the preemption issue before addressing the State's abstention defense. Pet. App. 8A-25A. And as a review of the decision makes clear, the preemption claim here is anything but "facially conclusive". Even though the complainant before the Massachusetts Commission Against Discrimination was not seeking to enforce any NLRA rights, instead alleging that she was harassed and differentially treated by her employer based on her sex, the majority delved into the facts of this case, to the extent of relying on the agency's investigative interrogatories to conclude that the sex discrimination claim in reality is one involving an unfair labor practice. Pet. App. 22A, 23A, 36A. Moreover, that the preemption claim is not "facially conclusive" is underscored by the thoughtful discussion of this question by Circuit Judge Lynch in dissent, who concludes that the state action should *not* be preempted by the NLRA. Pet. App. 39A-61A.

Should the Court of Appeals' inappropriate construction of the "facially conclusive" hypothetical in *NOPSI* be accepted, virtually every non-frivolous preemption claim will be captured by this approach, whereby the federal court analyzes the merits of the preemption claim before

addressing abstention, leading to inappropriate adjudication by lower federal courts of an issue which state courts (and administrative bodies) are fully capable of deciding. That such concern is justified is seen by the fact that this matter is not the only post-*NOPSI* Circuit Court of Appeals decision authorizing a preemption-based federal injunction against a state proceeding which otherwise meets the *Younger* criteria. *See Bud Antle, Inc. v. Barbosa*, 45 *F.*3d 1261, 1272-73 (9th Cir. 1994) (federal court injunction issued against ongoing proceeding before California Agricultural Labor Relations Board because of alleged preemption by NLRA); *Freehold Cogeneration v. Bd of Reg. Comm. of New Jersey*, 44 *F.*3d 1178, 1187, n. 6 (3d Cir. 1995), *cert. den.* ___ *U.S.* ___, 116 *S.Ct.* 68, 113 *L.Ed.*2d 29 (1995) (state rate-making hearing enjoined because of federal preemption).[1] *See also, Olde Discount Corp. v. Tupman*, 1 *F.*3d 202, 206-215 (3d Cir. 1993) (state proceeding for securities law violation enjoined because of preemption by Federal Arbitration Act, despite the absence of any

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[1] This is not to argue that the substantive preemption decisions in *Bud Antle* or *Freehold* necessarily were wrong. Rather, these decisions involve preemption claims in which the Circuit Courts of Appeals (as did the court below) engaged in a close examination of the merits of substantial but not "facially conclusive" preemption claims, precisely what this Court warned against in *NOPSI*. For example, the preemption question in *Bud Antle* turned on a heavily fact-sensitive issue of whether employees who handle and process agricultural goods are "agricultural laborers" exempt from NLRA coverage and subject to state regulation. Similarly, the preemption issue in *Freehold* was highly complex, relating to the interplay of state utility rate proceedings and the federal Public Utilities Regulatory Policies Act, requiring the court to engage in a detailed analysis of the state administrative hearing.

determination that preemption was "facially conclusive"); *Gartrell Const. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991) (action to enforce state contractors' licensing requirement enjoined because federal preemption was "readily apparent"). *Contra, CSXT, Inc. v. Pitz*, 883 F.2d 468 (6th Cir. 1989), *cert. den.*, 502 U.S. 812 (1991) ("to hold that a state court may decide Federal constitutional issues generally but should not decide preemption issues makes little sense"); *Employer Resource Management Co., Inc. v. Shannon*, 65 F.3d 1126, 1136 (4th Cir. 1995) (same).

At heart, the decision below manifests a distrust of the ability of state courts and administrative agencies to adjudicate federal preemption issues fairly. This distrust is misplaced, as state courts, and state agencies acting in a quasi-judicial capacity, routinely decide preemption issues (including those involving employment law, the setting here), often finding that federal law displaces the state proceeding. *See, e.g., Nolan v. Otis Elevator Co.*, 505 A.2d 580 (N.J. 1986), *cert. den.*, 479 U.S. 820 (1986) (ERISA preempts action under state anti-discrimination statute involving pension benefits); *Johnson v. Jaffray, Inc.*, 530 N.W.2d 790 (Minn.1995) (Federal Arbitration Act preempts state law discrimination action against securities broker); *Brotherhood of Maintenance of Way Emp. v. Chicago and Northwestern Transp. Co.*, 514 N.W.2d 90 (Iowa 1994) (Railway Labor Act preempts state statute on employee drug and alcohol testing); *Beaman v. Yakima Valley Disposal, Inc.*, 807 P.2d 849 (Wash. 1991) (state wrongful discharge claim preempted by NLRA). And more importantly, such distrust has been squarely repudiated by this Court in *Younger* and its progeny, which militate against

assuming federal jurisdiction where it would "reflect negatively" upon the willingness and ability of the state forum to apply federal law faithfully. *See, e.g., Juidice v. Vail*, 430 *U.S.* 327, 336 (1977).

For these reasons, *amici curiae* respectfully request that the petition for a writ of *certiorari* on the significant *Younger* abstention issue raised by this matter be granted.

II. THE PETITION SHOULD BE GRANTED BECAUSE DISCRIMINATION ACTIONS BROUGHT UNDER STATE LAW ARE NOT PREEMPTED EVEN WHEN ARISING FROM CONDUCT WHICH ALSO VIOLATES THE NLRA.

By holding that states are preempted from enforcing their anti-discrimination laws under circumstances involving conduct that is also encompassed by the NLRA, the majority misinterpreted Congressional intent and failed to give due regard to the importance of the states' interest in addressing discrimination by employers.[2]

That state and federal statutes may address the same basic areas of the law does not automatically compel a

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[2] Massachusetts asserts in the Petition (at 21-23) that the majority opinion below conflicts with a holding of the Massachusetts Supreme Judicial Court that a cause of action under the state's anti-discrimination action was not preempted by the NLRB. *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 *Mass.* 160, 375 *N.E.*2d 1192 (Mass. 1978). Similar decisions have also been made by the Supreme Courts of Iowa (*Franklin Manufacturing Co. v. Iowa Civil Rights Com.*, 270 *N.W.*2d 829, 834 (Iowa 1978)) and Alaska (*Bald v. RCA Alascom and Teamsters Local 359*, 569 *P.*2d 1328, 1335 (Alaska 1977)).

finding of federal preemption. Fighting discrimination, for instance, has consistently been recognized as an important exercise of the states' police powers. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 *U.S.* 537, 548 (1987). In such areas where the states have traditionally acted, the states are not to be deemed superseded unless that is "the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 *U.S.* 504, 516 (1992).[3]

San Diego Building Trades Council v. J.S. Garmon, 359 *U.S.* 236, 244 (1959), sets forth the general rule that a state may not regulate any activity which clearly or by reasonable inference falls within the scope of the NLRA. However, the states are not necessarily preempted in all areas which may fall within the broad scope of the NLRA. They may continue to regulate with respect to: (1) matters which "merely peripheral[ly] concern" the Act, and (2) "where the regulated conduct touched interests so deeply

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[3] Thus, it has been held that even ERISA, which contains an express provision preempting inconsistent state law (unlike the NLRA), does not necessarily preempt state anti-discrimination law. *Shaw v. Delta Air Lines*, 463 *U.S.* 85, 102-103 (1983). To interpret ERISA as completely preemptive of a state civil rights law would preclude the EEOC from referring claims to state agencies and frustrate the goal of Title VII to encourage joint enforcement. *Ibid. See also, Lingle v. Norge Div. of Magic Chef, Inc.*, 486 *U.S.* 399, 409-410 (1988) (under Section 301 of the Labor Management Relations Act, 29 *U.S.C.* § 185, an independent state cause of action may be pursued as long as it would not require interpretation of a collective bargaining agreement, even if dispute resolution under the LMRA and the state action would both require addressing precisely the same set of facts.)

rooted in local feeling and responsibility" that Congressional intent to preempt cannot be inferred. *Id.* at 234-235. As to enforcement of state anti-discrimination laws, both of these exceptions should be found to apply.

Focusing on the fact that both the NLRA action and the state discrimination claim in this case arose from the same conduct, the majority below failed to recognize the distinct aspects of this conduct being addressed by these separate laws. That discrimination in the workplace is not a principal concern of the NLRA is clear from cases holding that *federal* civil rights employment actions under Title VII, 42 *U.S.C.A.* § 2000e *et seq.*, are not preempted by the NLRA. This Court has expressly noted the coexistence of remedies under both statutes, observing, for example, that a Senate sponsor of the bill ultimately enacted as Title VII specifically declared that nothing in Title VII was intended to affect rights and obligations under the NLRA. *Alexander v. Gardner-Denver Co.*, 415 *U.S.* 36, 48, n.9 (1974), quoting 110 *Cong. Rec.* 7201 (1964). In fact, proposed amendments to make Title VII exclusive as to employment remedies were defeated. *Ibid.*

It is evident, then, that the NLRA does not preclude an individual harmed by an unlawful discriminatory employment practice from pursuing non-NLRA civil rights remedies, even though the discrimination arose in a context of NLRA-regulated activities. That Title VII allows for dual-filing of discrimination complaints with both the Equal Employment Opportunity Commission and state anti-discrimination agencies – thus expressly preserving all statutory rights – should not extinguish an

individual's state cause of action. Indeed, the Congressional intent is obviously otherwise. *Shaw v. Delta Air Lines, supra,* 463 *U.S.* at 102-103.

The second *Garmon* exception – the uniquely local aspect of anti-discrimination law enforcement – further supports the argument against preemption. The states' interest in prohibiting discrimination has been deemed "substantial" and "compelling" and is therefore a paramount basis for exercising their police powers. *Board of Directors of Rotary International v. Rotary Club of Duarte, supra; Ohio Civil Rights Comm. v. Dayton Christian Schools, supra,* 477 *U.S.* at 628. This is precisely why state civil rights statutes complement – and in fact play a significant part in – Title VII's enforcement scheme. Congress made clear that Title VII does not supersede state law in this area, and, as mentioned above, permits for preservation of a claimant's rights by providing for dual-filed complaints.

The eradication of discrimination in employment has long been recognized to be a supreme interest of the states. That such discrimination may arise in a context which also invokes the authority of the NLRB because it involves unlawful labor organizational practices should not deprive a victim of discrimination of the appropriate remedy for the violation of his or her civil rights. This intent was not expressed by Congress when it enacted the NLRA and should not be inferred therefrom.

In sum, *amici curiae* respectfully submit that the petition should be granted on this preemption issue, on which there is a split between the decision below and those of various state supreme courts, and which will

have a significant impact on the states' enforcement of their anti-discrimination laws.

CONCLUSION

For the foregoing reasons *amici curiae* states respectfully request this Court to grant the petition for a writ of *certiorari* on both the abstention and preemption questions raised by the petition.

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